FILED
MAY 25 1994
OFFICE OF THE CLERK

No. 93-1881

In The

Supreme Court of the United States

October Term, 1993

DENNIS RUARK, SR. and MARY RUARK,

Petitioners,

vs.

LELAND BOATWRIGHT, GREGG REED, and ROBERT COMER,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. DID THE EIGHTH CIRCUIT APPLY THE CORRECT LEGAL TEST IN DETERMINING THAT THE EIGHTH AMENDMENT RIGHTS OF PETITIONERS' SON TO EMERGENCY MEDICAL HELP WERE NOT VIOLATED BY A 20 OR 36 MINUTE DELAY IN SUMMONING MEDICAL ASSISTANCE BECAUSE PETITIONERS WERE REQUIRED TO PROVE BOTH DELIBERATE INDIFFERENCE BY RESPONDENTS AND WANTONNESS AND OBDURACY ON THEIR PART?

II. DID THE EIGHTH CIRCUIT APPLY THE CORRECT LEGAL TEST FOR GRANTING SUMMARY JUDGMENT BY REFUSING TO CONSIDER EVIDENCE OFFERED BY PETITIONERS IN OPPOSITION TO RESPONDENTS' MOTION FOR SUMMARY JUDGMENT ON THE GROUND THAT SUCH EVIDENCE WAS NOT SUFFICIENTLY CREDIBLE?

TABLE OF CONTENTS

Page

Questions Presented for Review i

Table of Authorities iii

Opinions Below 1

Jurisdiction 2

Constitutional Provisions Involved 2

Statement of the Case 3

Reasons for Granting the Writ 7

Conclusion 17

Appendix A1

Appendix A – Opinion of the United States Court of Appeals for the Eighth Circuit A1

Appendix B – Opinion of the United States District Court for the Western District of Missouri ... A13

Appendix C – Affidavit of Mark Reeder A27

TABLE OF AUTHORITIES

Page

CASES

Ancata v. Prison Health Services, Inc., 769 F.2d 700 (11th Cir. 1985) 9

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 13, 15, 17

Celotex Corporation v. Catrett, 477 U.S. 317 (1986) 17

Cortes-Quinones v. Jiminez-Nettleship, 842 F.2d 556 (1st Cir. 1988) 9

Davis v. Zahradnick, 600 F.2d 458 (4th Cir. 1979) 15

Duckworth v. Franzen, 780 F.2d 645 (7th Cir. 1985), *cert. denied*, 479 U.S. 816 (1986) 8

Estelle v. Gamble, 429 U.S. 97 (1976) 8

Howell v. Evans, 922 F.2d 712 (11th Cir. 1991), *vacated on other grounds*, 931 F.2d 711 (11th Cir. 1991) 8, 12

Hudson v. McMillian, 503 U.S. ___, 117 L.Ed.2d 156 (1992) 11, 12, 13

Miltier v. Beorn, 896 F.2d 848 (4th Cir. 1990) 12

Rellergert v. Cape Girardeau County, Missouri, 942 F.2d 794 (8th Cir. 1991) 9

Sosebee v. Murphy, 797 F.2d 179 (4th Cir. 1986) 15

Whitley v. Albers, 475 U.S. 312 (1986) 9, 10, 11

Wilson v. Seiter, 501 U.S. ___, 115 L.Ed.2d 271 (1991) 10

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. VII 2, 13

U.S. Const. Amend. VIII 2, 9, 12, 13

RULES

Rule 613, F.R. Ev. 14

Rule 801(d)(2), F.R.Ev. 14

Rule 56(c), F.R.Civ.P. 17

OTHER SOURCES

10A C. Wright, A. Miller, and M. Kane, *Federal Practice and Procedure: Civil 2d* § 2727 (1983) 14

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States District Court for the Western District of Missouri is not officially reported. It is, however, set out in Appendix B to this Petition. The opinion of the United States Court of Appeals for the Eighth Circuit has not been reported as of the date of this Petition; it is set out in Appendix A.

JURISDICTION

This action was filed under 42 U.S.C. § 1983. The district court's jurisdiction was based on 28 U.S.C. §§ 1331 and 1343.

The judgment of the district court was entered on June 8, 1993. Petitioners timely filed their Notice of Appeal, appealing the district court's judgment to the United States Court of Appeals on June 11, 1993. On April 4, 1994, the Eighth Circuit handed down its opinion, affirming the district court's judgment. On May 2, 1994, the Eighth Circuit denied rehearing.

This Court's jurisdiction is bestowed by 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Eighth Amendment to the United States Constitution which provides as follows:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

It also involves the Seventh Amendment to the Constitution which provides as follows:

> In suits at common law where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of common law.

STATEMENT OF THE CASE

This case arises out of the death of Dennis Ruark, Jr. who strangled on his own vomit while a prisoner in the jail in Jasper County, Missouri on September 30, 1985. The Petitioners – Plaintiffs in the trial court – are Ruark's parents. Respondents are the Sheriff of Jasper County and two of the jail guards.[1]

When Ruark was 17 years old, he and a friend broke into a card shop in Joplin, Missouri. Ruark was apprehended and confessed to the police. Later he pleaded guilty to burglary charges and was given a suspended sentence with five years probation. When he was 21 years old, Ruark was caught relieving himself on the side of a road by police and was charged with urinating in public, a municipal ordinance violation. As a result his probation was revoked, and he was sentenced to a year in the Jasper County Jail.

While in jail Ruark was permitted to participate in a work-release program. He also became involved in using narcotics (which were apparently endemic in the jail).

On September 29 or 30, 1985, Ruark took an overdose of drugs. He was scheduled to get up for his work-release job around 6:00 a.m. on September 30. One of the guards, Robert Comer, yelled at Ruark to wake up at 5:15 a.m. (App. 154, 422), and again at 6:00 (App. 156). Ruark did not respond.

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[1] Petitioners also sued the warden of the jail, another guard, and Jasper County, Missouri. Certiorari is not being sought as to those defendants.

In his deposition given on April 30, 1992, Comer admitted that at 6:15 he again attempted to awaken Ruark (unsuccessfully) by entering his dormitory and shaking him (App. 158). At that time he observed that Ruark "was having difficulty breathing" (App. 157-158), and he had brown fluid running from the corners of his mouth (App. 158). In another conversation in 1989 Comer said that Ruark was also choking at 6:15 (App. 106), although in his deposition he denied making that statement (App. 173).

The evidence is uncontroverted that, regardless of whether Ruark was choking at 6:15, Comer was concerned by his obvious difficulty in breathing, his inability to be awakened, and the fluid running from his mouth (App. 160-161). The evidence is also uncontroverted that, despite this concern, Comer did nothing to help Ruark except leave him alone for the next quarter hour. There was no evidence that Comer's abandonment of Ruark was occasioned by competing demands for his attention.

Comer returned at 6:30 to find Ruark still breathing abnormally (App. 161). He still could not arouse Ruark who still had brown fluid running out of his mouth (App. 161-162). At that point Comer sought assistance from another guard, Gregg Reed.

Reed had previous training as a paramedic. When Reed saw Ruark at 6:30, he observed his labored breathing and brown fluid running from his mouth and nose, pooling on the floor beneath his bunk (App. 212, 214). Given his background, Reed realized that Ruark was in peril (App. 215-217), and he knew that the means to help him were not available in the jail (App. 219). He also

knew that time was critical in summoning help (App. 217, 223-224). For that reason Reed claims he hurried to Sheriff Leland Boatwright to summon emergency medical help (App. 215). The Sheriff's office was in very close proximity (about 65 feet) to the dormitory where Reed saw Ruark (App. 314-315).

Reed claims he hurried and told Sheriff Boatwright of the emergency (App. 215-216), and Boatwright claims he had an ambulance called as soon as he learned of the emergency (App. 363). Since both Reed and Boatwright realized Ruark's peril, one would expect a call for an ambulance to have gone out shortly after 6:30. Instead, ambulance company records show no call for help was received until 6:51 (App. 88),[2] 20 minutes after Reed and Boatwright were alerted to the emergency, and 36 minutes after Comer first became concerned.

When the ambulance company was finally called at 6:51, the Sheriff's Department requested service on a *non-emergency* basis (App. 91). Because the ambulance crew changed shifts at 7:00, and because the call was an apparent non-emergency, the ambulance did not leave the hospital for the jail until 6:59 (App. 92), and when it did, it came without red lights and siren (App. 92). It arrived at the jail at 7:05 (App. 88), six minutes after leaving the hospital, about 35 minutes after Reed and Boatwright realized there was an emergency, and 50 minutes after Comer first became concerned by Ruark's comatose state,

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[2] Jail records show the call was made at 6:50 a.m. (App. 425).

his respiratory difficulty, and the brown fluid draining from his mouth (App. 88).

After the ambulance attendants arrived, Ruark finally stopped breathing (App. 99). The paramedics tried to revive him. Because of the obvious severity of Ruark's condition, the return trip from the jail to the hospital was made as a life-threatening emergency run (App. 88). With lights and siren on, it only took two minutes to get from the jail to the hospital (App. 88). Unfortunately, Ruark was dead by the time he finally arrived at the hospital (App. 99).

An autopsy report on Ruark showed the presence of brownish fluid in his lungs (App. 31). This fluid was "consistent with aspirated gastric fluid. . . . " (App. 32). The cause of death was noted as "hypoxia secondary to acute bilateral aspiration pneumonia related to an impaired state of consciousness due to an elevated blood morphine level" (App. 23).

Petitioners filed suit in the United States District Court for the Western District of Missouri pursuant to 42 U.S.C. § 1983, alleging that Respondents violated their son's Eighth Amendment rights by their deliberate indifference to his obvious medical emergency. Petitioners were prepared to present medical testimony at trial that, if medical treatment had been given Ruark earlier, he would have survived.

Unfortunately, Petitioners were never given that chance. The district court granted summary judgment to Comer, Reed, and Boatwright, holding as a matter of law that they were not deliberately indifferent. On April 4,

1994, the Eighth Circuit affirmed that judgment. On May 2, 1994, the Eighth Circuit denied rehearing.

REASONS FOR GRANTING THE WRIT

I. The Holding of the Court of Appeals as to the Conduct of Respondents Reflects the Confusion Surrounding the Phrase "Deliberate Indifference" in Eighth Amendment Cases.

In affirming summary judgment as to Reed and Boatwright, the Court of Appeals held that "it cannot be said, as a matter of law, that a twenty minute delay in securing assistance to have the ambulance called, *in and of itself*, constitutes obduracy and wantonness" (emphasis in original) (A-10). Similarly, as to Comer the Court held that, even if Comer knew at 6:15 a.m. that Ruark was choking, having difficulty breathing, had brown fluid running out of his mouth, and could not be awakened, Comer's failure to summon medical help at 6:15, as a matter of law, did not constitute "obduracy and wantonness" (A-8) so as to rise to the level of deliberate indifference.[3]

[3] The Eighth Circuit noted that Comer denied in his deposition that Ruark was choking at 6:15 a.m. (A-7). Petitioners presented an affidavit in opposition to Respondents' Motion for Summary Judgment in which an investigator they hired swore that, before he was a party, Comer told the investigator that Ruark was choking at 6:15 (App. 106; A-27). The Eighth Circuit discounted the credibility of that Affidavit (A-8). It went on to hold, however, that even if Ruark was choking at 6:15, that fact (along with the fluid coming out of his mouth, his respiratory distress, and his comatose condition) did not cause Comer's failure to rise to the level of obduracy and wantonness (A-8).

Petitioners would submit these holdings reflect the generalized confusion, rampant among the Circuits, as to what is meant by "deliberate indifference."

This Court first announced that standard in *Estelle v. Gamble*, 429 U.S. 97, 102 (1976), where it noted that the Eighth Amendment's ban on cruel and unusual punishment went beyond merely proscribing "physically barbarous punishments." It extended to a failure to provide for prisoners' serious medical needs. Thus, "deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain'. . . proscribed by the Eighth Amendment." 429 U.S. at 104. Such indifference may be manifested "by prison guards intentionally . . . delaying access to medical care. . . . " *Ibid.* The Court was careful to note that an inadvertent failure to provide medical care was not enough: "In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." *Ibid.*, at 106.

Unfortunately, what was meant by deliberate indifference was unclear. That led to Judge Posner's widely-cited observation in *Duckworth v. Franzen*, 780 F.2d 645, 652 (7th Cir. 1985), *cert. denied*, 479 U.S. 816 (1986):

> The reigning formula of course is "deliberate indifference," . . . but the term is not self-defining. Indeed, like other famous oxymorons in law – "all deliberate speed" for example or "substantive due process" – it evades rather than expresses precise meaning.

In the wake of *Estelle* many courts tried to formulate a definition of deliberate indifference. Thus, in *Howell v. Evans*, 922 F.2d 712, 720 n. 7 (11th Cir. 1991), *vacated on*

other grounds, 931 F.2d 711 (11th Cir. 1991), the Court held that, to constitute deliberate indifference, a delay in providing medical care for a prisoner must occur "in the face of information that a reasonable person would know requires action." In *Miltier v. Beorn*, 896 F.2d 848, 853 (4th Cir. 1990), the Fourth Circuit held that: "Failure to respond to an inmate's known medical needs raises an inference that there was deliberate indifference to those needs." Other circuits had somewhat different formulations, *see, e.g., Rellergert v. Cape Girardeau County, Missouri*, 924 F.2d 794, 797 (8th Cir. 1991) (deliberate indifference is "apathy or unconcern"); *Ancata v. Prison Health Services, inc.*, 769 F.2d 700, 704 (11th Cir. 1985) (intentional failure to provide service acknowledged to be necessary constitutes deliberate indifference); *Cortes-Quinones v. Jiminez-Nettleship*, 842 F.2d 556, 558 (1st Cir. 1988) (acts or omissions so dangerous in respect to health or safety that knowledge of the risk can be inferred).

In the case at bar the Eighth Circuit did not disagree with these holdings. Instead, it tacked on an additional requirement that the delay in obtaining medical help "must also be prompted by 'obduracy and wantonness, not inadvertence or error in good faith.' " (A-7.)

The Eighth Circuit derived the requirement of "obduracy and wantonness" from *Whitley v. Albers*, 475 U.S. 312, 319 (1986). In *Whitley* an inmate was shot by a prison guard. The question before the Court was what legal standard should govern the inmate's Eighth Amendment claim. The Court reiterated its holding in *Estelle* that the Eighth Amendment forbids the "unnecessary and wanton infliction of pain." 475 U.S. at 319. What is necessary to establish an "unnecessary and wanton

infliction of pain" varies according to the nature of the constitutional violation, *Ibid.*, at 320. An express intent to inflict unnecessary pain is not required, *Ibid.*, at 319. However, mere negligence is not enough; "obduracy and wantonness characterize the conduct prohibited" by the Eighth Amendment, *Ibid.*

Whitley went on to hold that a deliberate indifference standard was sufficient to constitute "wantonness and obduracy" in the context of the State's responsibility to attend to the medical needs of prisoners, 475 U.S. at 320. It was inadequate, however, in a case (like *Whitley*) involving force used for the restoration of order during a prison riot, *Ibid.* Under those circumstances "wantonness" means force applied "maliciously and sadistically for the very purpose of causing harm." *Ibid.*, at 320-321.

Six years later in *Wilson v. Seiter*, 501 U.S. ___, 115 L.Ed.2d 271, 279 (1991), this Court synthesized *Whitley* and its other Eighth Amendment cases by holding that, to state a cognizable claim in Eighth Amendment cases, a plaintiff must satisfy, *inter alia*, a subjective component – "did the officials act with a sufficiently culpable state of mind?" But that was not the end of the inquiry. Having determined that some mental state was required, it remained to be determined what state of mind applies. Thus, in *Wilson* the Court emphasized again the requirement that the state of mind be wanton, 115 L.Ed.2d at 281. However, the Court went on to reiterate *Whitley's* holding that:

> [W]antonness does not have a fixed meaning but must be determined with "due regard for differences in the kind of conduct against which

> an Eighth Amendment objection is lodged." 475 U.S. at 320.

115 L.Ed.2d at 281. The Court also emphasized *Whitley's* holding that, in the context of a prison riot case, wantonness meant acting maliciously and sadistically, but in the context of a case involving failure to provide medical help, " 'deliberate indifference' would constitute wantonness." *Wilson*, 115 L.Ed.2d at 281.

These principles were reaffirmed most recently in *Hudson v. McMillian*, 503 U.S. ___, 117 L.Ed.2d 156, 165 (1992). In his Concurring Opinion Justice Stevens noted the "particularly high standard of proof" required to make out an Eighth Amendment claim in a prison riot context, 117 U.S. at 169. Absent such special circumstances, a "less demanding standard" applies, *Ibid.*, at 170.

In the instant cause the Eighth Circuit held that the requirement of "obduracy and wantonness" provides an additional hurdle for claimants to overcome when they allege that they are the victims of the failure of jail officials to attend to their medical needs. In other words the Eighth Circuit imposed a requirement of wantonness and obduracy *in addition to* deliberate indifference. The flaw of the Eighth Circuit's reasoning is that it ignores the plain teaching of *Whitley* and *Wilson*: wantonness adds nothing to the test of deliberate indifference because deliberate indifference constitutes wantonness in a case involving delay in obtaining medical attention for a critically ill inmate.

The question that remains, then, is how does one define deliberate indifference? The formulation suggested

by the Eleventh Circuit in *Howell v. Evans, supra,* is highly workable and satisfies the intent of this Court in *Estelle.* In *Howell* the Court indicated that the failure to provide medical attention would constitute deliberate indifference if a jail official recklessly ignored a prisoner's medical condition in the face of information that a reasonable person would know requires action, 922 F.2d at 720 n. 7. It follows that a party alleging deliberate indifference should be able to prove culpable conduct by showing a failure to respond to an inmate's known medical needs, *Miltier v. Beorn, supra,* 896 F.2d at 853. Such a showing is consistent with the concepts of dignity, civilized standards, humanity, and decency that animate the Eighth Amendment, *Hudson, supra,* 117 L.Ed.2d at 168-169.

If that standard is adopted by this Court, the impropriety of summary judgment as to Reed and Boatwright is readily apparent. There is no question that Reed and Boatwright were aware of Ruark's respiratory distress and the potentially serious consequences such distress could cause (App. 223-224; 292-293). Both knew the need to summon emergency medical as quickly as possible (App. 223-224; 374), but a reasonable inference is that they waited 20 minutes before calling an ambulance for a young man who was slowly choking to death. Under these facts a jury could reasonably believe that Reed and Boatwright failed to respond to Ruark's known medical needs.

The Eighth Circuit held that a mere 20 minute delay in summoning help for a critically ill prisoner, "without more," did not offend the concepts of dignity, civilized standards, humanity, and decency embodied in the

Eighth Amendment (A-10). Perhaps such conduct would be unexceptionable in, say, Cambodia in the 1970s, but it should be mightily offensive in the United States in the waning years of the 20th Century during which, one hopes, the "evolving standards of decency that mark the progress of a maturing society," *Hudson*, supra, 117 L.Ed.2d at 167, preclude apathy toward a man who slowly dies, needlessly.

As to Comer, if one assumes that he saw Ruark choking and unable to breathe normally with brown fluid coming out of his mouth at 6:15 a.m., his observation of those facts is the kind of information that a reasonable person would know requires action. Comer's indifference to Ruark as he lay choking for a quarter hour offends the same evolving standards of decency adverted to earlier.

This Court should grant certiorari to provide guidance in Eighth Amendment cases by the articulation of a coherent definition of deliberate indifference, one that expresses rather than evades precise meaning.

II. The Eighth Circuit's decision to discount evidence of Comer's admission that Ruark was choking at 6:15 a.m. constitutes an improper application of the rules governing summary judgment.

While this Court greatly liberalized the standards for granting summary judgment in cases like *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), and *Celotex Corporation v. Catrett*, 477 U.S. 317 (1986), it carefully avoided encroachment on traditional jury functions which are central to the right to trial by jury guaranteed by the Seventh Amendment. Thus, in *Anderson* the Court held that:

> Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict.

477 U.S. at 255. For that reason the "evidence of the nonmovant is to be believed. . . . " *Ibid.*

Unfortunately, these principles were ignored by the Eighth Circuit. The Eighth Circuit twice noted that Comer denied in his deposition that Ruark was choking at 6:15, or that he had ever told anyone Ruark was choking (A-4, 7). It did so in the face of an Affidavit by Petitioners' investigator, Mark Reeder, in which Reeder swore that Comer told him in 1989 that Ruark was choking at 6:15 (App. 106).[4] Reeder's testimony, if presented live at trial, would be competent to impeach Comer, Rule 613, F.R.Ev., or as an admission, Rule 801(d)(2), F.R.Ev.

The Eighth Circuit discounted the Affidavit since it was not executed until 1992, three years after Comer talked to Reeder (A-8). The Eighth Circuit implied that the Affidavit was too incredible to be believed, citing 10A C. Wright, A. Miller, and M. Kane, *Federal Practice and Procedure: Civil 2d* § 2727, at 170 (1983) (A-8).

The problem with the Eighth Circuit's Opinion is that it inevitably requires the Court to weigh the relative credibility of Comer and Reeder, something that is impossible to do on the basis of affidavits and depositions. It is also a function that is exclusively for a jury rather than a

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[4] The Affidavit of Reeder is reproduced in the Appendix to this Petition (A-27).

judge. It was for that very reason that this Court held in *Anderson* that the evidence of nonmovant – here, the Petitioners – is to be believed in deciding summary judgment, 477 U.S. at 249. In the context of this case that means that the Eighth Circuit should have assumed Reeder was telling the truth when he said Comer admitted that Ruark was choking and could not breathe at 6:15.

The instant cause is not the first time that a district court has attempted to resolve a factual conflict in a case involving inmate rights by disdaining affidavits that would otherwise preclude summary judgment. In *Davis v. Zahradnick*, 600 F.2d 458 (4th Cir. 1979), the district court granted summary judgment on the basis of affidavits filed by guards which denied the allegations appearing in the plaintiff's verified complaint. On appeal the Fourth Circuit noted:

> Although summary judgment under Rule 56 is a useful device for adjudicating prisoner § 1983 claims, it may not be invoked where, as here, the affidavits present conflicting versions of the facts which require credibility determinations.

600 F.2d at 460. In *Sosebee v. Murphy*, 797 F.2d 179 (4th Cir. 1986), the district court found affidavits by convicted felons to be unbelievable and granted summary judgment to prison guards. On appeal the Court reversed, holding:

> Plaintiff is entitled to have all her evidence considered. Moreover, the credibility of her evidence must be assumed. [Citations omitted.] *Only the trier of fact can assess the truthfulness of an affidavit.*

(Emphasis added.) 797 F.2d at 182.

There may be rare cases where a summary judgment court can disregard evidence that is too incredible to be believed. For example, if Reeder had sworn that he learned of Comer's admission by telepathic interception, that may well be the kind of evidence that is too incredible to be believed.

That is not what Reeder said, however. In his affidavit Reeder swore to what Comer told him on March 7, 1989 (App. 106). Comer denies making that statement, but how can anyone discern who is telling the truth without seeing the demeanor of the witnesses? Only through *live* cross-examination of Comer or Reeder could a fact-finder observe their relative credibility.

The Eighth Circuit questioned the verity of Reeder's affidavit because it was not executed until 1992, three years after he interviewed Comer (A-8). The Eighth Circuit thereby implies that Petitioners had a duty to obtain an affidavit from Reeder immediately after the interview in order to prevent it from being too incredible to be believed.

In preparing a response to Respondents' Motion for Summary Judgment, Petitioners deposed Comer on April 30, 1992 (App. 108). In the course of his deposition Petitioners learned for the first time that Comer had changed his story and denied that he had even spoken with Reeder (App. 172-173). The Affidavit executed by Reeder on May 7, 1992 (one week after Comer's deposition) directly responded to the false statements in Comer's deposition (App. 106-107). The reason the Affidavit was not executed until 1992 is that until Comer's deposition, Petitioners did not know he would deny talking to

Reeder. The fact that Petitioners responded to Comer's false statement by affidavit is wholly within the procedures authorized by Rule 56(c), F.R.Civ.P., *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

Petitioners would submit that the Seventh Amendment guarantees them the right to have a jury decide if Comer was being truthful when he denied what he earlier admitted. To the extent the Eighth Circuit held that Reeder's affidavit may be disregarded, it overlooked this Court's command that credibility determinations and the weighing of evidence "are jury functions, not those of a judge. . . . " *Anderson, supra*, 477 U.S. at 255.

CONCLUSION

For the reasons stated, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 93-2648

Dennis Ruark, Sr., and Mary Ruark, Appellants, v. Don Drury, Dick Fehr, Leland Boatwright, Cotton Comer, Gregg Reed, and Jasper County, Missouri, Appellees.	* * * * * * * * * * * * *	Appeal from the United States District Court for the Western District of Missouri.

Submitted: January 14, 1994

Filed: April 4, 1994

Before McMILLIAN and MORRIS SHEPPARD ARNOLD, Circuit Judges, and STROM,* District Judge.

MORRIS SHEPPARD ARNOLD, Circuit Judge.

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* The HONORABLE LYLE E. STROM, Chief Judge, United States District Court for the District of Nebraska, sitting by designation.

In September, 1985, Dennis Ruark, Jr., was an inmate at the jail in Jasper County, Missouri. He was 21 years old. When jail guards could not wake him one morning after several tries, they called an ambulance. Mr. Ruark died on the way to the hospital, apparently from a drug overdose.

In September, 1988, Mr. Ruark's parents – Dennis Ruark, Sr., and Mary Ruark – sued for damages in federal court. They alleged a deprivation of their son's constitutional rights by various jail personnel and the county, *see* 42 U.S.C. § 1983, specifically, his right to be free from cruel and unusual punishment under the eighth amendment, made applicable to the states by the fourteenth amendment. *See, e.g., Estelle v. Gamble,* 429 U.S. 97, 101-02 (1976). The Ruarks contended that there had been an intentional delay in calling the ambulance and thus that the jail personnel had exhibited "deliberate indifference to [their son's] serious illness or injury." *Estelle v. Gamble,* 429 U.S. at 105. The defendants moved for summary judgment. In mid-1993, the trial court granted that motion. The Ruarks appeal. We affirm the judgment of the trial court.[1]

I.

Dennis Ruark, Jr., left the jail one morning on a work release program. When he returned that evening, he was

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[1] The Honorable James C. England, United States Magistrate Judge for the Western District of Missouri, to whom the case was submitted by consent of the parties. *See, e.g.,* 28 U.S.C. § 636(c)(1).

checked in by Dick Fehr, the assistant warden of the jail. According to Mr. Fehr's deposition testimony, Mr. Ruark's face at that time was "red and flushed." Mr. Fehr further testified that Mr. Ruark "seemed to be moving a little slower than usual, like somebody that [might] have had the flu or a cold."

The next morning, Cotton Comer, a jail security officer, tried to wake Mr. Ruark "shortly before breakfast," which was usually served around 6:00 a.m., by "holler[ing] for [him] . . . to wake up." According to Mr. Comer's deposition testimony, he "[s]hook" Mr. Ruark and "told him it was time to get up." In response, Mr. Ruark "mumbled." After Mr. Comer had served breakfast to the other inmates, "about" 6:00 a.m., he returned to Mr. Ruark's cell, "again hollered" for Mr. Ruark "to get moving . . . and . . . to get up," and "went in again to shake him." Mr. Comer testified that he was not concerned at that point because Mr. Ruark "always slept hard" and was "[a]lways hard to wake." Don Drury, the jail warden, testified in his deposition that "you couldn't wake up [Mr. Ruark] any morning of the week" and that "security offices [had] even picked the end of his bunk up and dropped it and couldn't wake him up under any conditions under any day of the week." Mr. Drury further testified that "every [jail] security officer that . . . was responsible for waking [Mr. Ruark] up" for his work release program had complained that "they could not get him woke up," that "[t]hey'd go back there anywhere from five to six times to shake him and wake him." On one occasion, Mr. Drury stated, he had "even told them to lock [Mr. Ruark] up and forget him, and don't wake him

up. If he don't want to get up and go to work, that's his problem."

Around 6:15 a.m., Mr. Comer went to check on Mr. Ruark again. At that time, Mr. Comer "observed [Mr.] Ruark sleeping . . . on his back and breathing raspily." Mr. Ruark sounded "[l]ike he was having difficulty breathing" but not like he was "choking." Mr. Comer "shook [Mr.] Ruark's hand and shoulder . . . and only got a mumble . . . without any other response." At that time, Mr. Comer, who had had no medical training, noticed brown fluid coming from Mr. Ruark's mouth but assumed that Mr. Ruark "had been chewing tobacco," which Mr. Ruark had been known to do sometimes before falling asleep.

Around 6:30 a.m., Mr. Comer returned to Mr. Ruark's cell. He saw Mr. Ruark "lying on his left side and breathing blubberly." He described Mr. Ruark as "breathing very hard" and as "having obvious difficulty breathing." Mr. Comer "again shook" Mr. Ruark, who "mumbled a little." Mr. Comer then turned Mr. Ruark "over on his stomach in view of the blubberly breathing." Mr. Comer again saw brown fluid coming from Mr. Ruark's mouth. Still unable to rouse Mr. Ruark, Mr. Comer became "concerned," thinking that Mr. Ruark had perhaps "swallowed chewing tobacco which . . . might cause him to choke to death," and called for help from Gregg Reed, another jail security officer. Mr. Reed came to the cell with a flashlight, which showed that brown fluid was coming from Mr. Ruark's nose as well. At that point, Mr. Comer became "alarmed."

Mr. Reed testified in his deposition that when he was called to Mr. Ruark's cell by Mr. Comer at 6:30 a.m., Mr. Ruark "was laying on his stomach" and "was warm to the touch" but had "labored breathing." Mr. Reed saw brown fluid coming from Mr. Ruark's nose and mouth, "pooling on the floor." Mr. Reed, who had had training as a paramedic, "believed that there was an emergency" and "hurried" "immediately" to the sheriff and reported that they had "a problem in the back of the jail." The sheriff told the dispatcher to call an ambulance.

According to the deposition testimony of Leland Boatwright, the sheriff, "the call was made immediately," "before there was any more talk, in other words to ask why or what was the problem," "before anybody said why, where, and all about it." Sheriff Boatwright was sure that he "inquired immediately" about Mr. Ruark's condition and then "called back" to the ambulance dispatcher "and told them to get there as fast as possible." The dispatch log at the sheriff's office reflects that an ambulance was called for Mr. Ruark at 6:50 a.m. The ambulance service's records reflect that the call was received at 6:51 a.m. The dispatch log at the sheriff's office states that the ambulance arrived at 7:03 a.m. and left for the hospital less than 15 minutes later. Mr. Ruark was subsequently pronounced dead at the hospital, but, according to the ambulance attendants, he actually died on the way to the hospital.

Mr. Ruark's parents sued Sheriff Boatwright; Don Drury, the jail warden; Mr. Fehr, the assistant jail warden; and Mr. Comer and Mr. Reed, the security officers at the jail. (We note that the Ruark's brief on appeal does not offer any arguments specific to Mr. Fehr; since the trial

court also remarked that the Ruarks' response to the summary judgment motion of the defendants failed to deal with Mr. Fehr, we conclude that the Ruarks have dropped any claims relating to him.) The Ruarks alleged that all of the individual defendants were personally involved in causing a delay between 6:00 a.m., when Mr. Ruark was first unable to be awakened, and 6:30 a.m., when Mr. Ruark's condition was recognized as an emergency, and between 6:30 a.m. and 6:50 a.m., when an ambulance was called. The Ruarks also alleged that jail personnel should have realized much earlier that Mr. Ruark was seriously ill. The Ruarks sued the county as well, alleging that the failure to train jail personnel with respect to recognizing medical emergencies was directly responsible for Mr. Ruark's death.

II.

It is well settled that an intentional delay in obtaining medical care for a prisoner who needs it may be a violation of the eighth amendment. *See, e.g., Estelle v. Gamble,* 429 U.S. 97, 104-05 (1976). To create liability, however, that delay must occur "in the face of information that a reasonable person would know requires action," *Howell v. Evans,* 922 F.2d 712, 720 n.7 (11th Cir. 1991), *vacated on other grounds,* 931 F.2d 711 (11th Cir. 1991) (*per curiam*), *see also id.* at 720 and *Brown v. Hughes,* 894 F.2d 1533, 1537-38 (11th Cir. 1990) (*per curiam*), *cert. denied,* 496 U.S. 928 (1990), or must involve " 'acts or omissions [that are] so dangerous (in respect to health or safety)' that knowledge of the risk can be inferred," *Fruit v. Norris,* 905 F.2d 1147, 1150 (8th Cir. 1990), quoting *Cortes-Quinones v. Jimenez-Nettleship,* 842 F.2d 556, 558 (1st Cir. 1988), *cert denied,* 488

U.S. 823 (1988). *See also Miltier v. Beorn*, 896 F.2d 848, 851-52 (4th Cir. 1990); *Duckworth v. Franzen*, 780 F.2d 645, 652-53 (7th Cir. 1985), *cert. denied*, 479 U.S. 816 (1986); and *Church v. Hegstrom*, 416 F.2d 449, 451 (2d Cir. 1969). That delay must also be prompted by "obduracy and wantonness, not inadvertence or error in good faith," *Whitley v. Albers*, 475 U.S. 312, 319 (1986), before liability may be imposed.

In the portion of its opinion granting summary judgment to Cotton Comer, the trial court noted that Mr. Ruark was known to be hard to wake. We note that Mr. Ruark had also been known to fall asleep with chewing tobacco in his mouth and that Mr. Comer described Mr. Ruark's breathing at 6:15 a.m. as "labored" but "not choking."

The Ruarks contend on appeal, however, that Mr. Comer described Mr. Ruark's condition at 6:15 a.m. as "choking and could not breathe" when the Ruark's investigator interviewed Mr. Comer before Mr. Comer was added as a defendant in the case. The Ruarks also refer to their own depositions, in which each of them denied that their son was hard to wake when he was living at home. Those items of evidence, the Ruarks assert, establish the existence of a genuine issue of material fact, *see* Fed. R. Civ. P. 56(c), Fed. R. Civ. P. 56(e), with respect to whether Mr. Comer should have known as of 6:00 a.m. or 6:15 a.m. that Mr. Ruark was seriously ill, or knew as of 6:30 a.m. of the severity of Mr. Ruark's condition but failed to act appropriately in response.

The defendants respond that the investigator's affidavit containing Mr. Comer's alleged description of Mr.

Ruark's condition at 6:15 a.m. was not executed until mid-1992, more than three years after Mr. Comer's interview with the Ruarks' investigator and more than six and a half years after the events surrounding Mr. Ruark's death, and is therefore not reliable enough to prevent summary judgment. With respect to the Ruarks' depositions, we note that Mr. Ruark's father stated that although he could "not recall right now" any difficulty in waking his son, he also stated that he did not personally wake Mr. Ruark when Mr. Ruark was living at home but, rather, that it was Mr. Ruark's mother who customarily did so. We note as well that although Mr. Ruark's mother denied that Mr. Ruark was hard to wake, she also stated that she no longer woke him after his sophomore year in high school but, rather, that Mr. Ruark himself "was responsible to get himself up starting his junior year."

Under those circumstances, we agree with the trial court that the Ruarks have failed to establish the existence of a *genuine* issue of material fact, either with respect to the jail personnel's reported difficulties in waking Mr. Ruark or with respect to his condition at 6:15 a.m. *See, e.g., Cervantes v. Time, Inc.*, 464 F.2d 986, 994-95 (8th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973), and *Lundeen v. Cordner*, 354 F.2d 401, 406-08 (8th Cir. 1966); *see also* 10A C. Wright, A. Miller, and M. Kane, *Federal Practice and Procedure: Civil* 2d § 2727 at 157-70 (1983). Even if we were to hold, moreover, that a genuine issue of material fact existed with respect to Mr. Ruark's condition at 6:15 a.m., we also agree with the trial court that the Ruarks have failed to establish the existence of a genuine issue of material fact with respect to any "obduracy and wantonness," *Whitley v. Albers*, 475 U.S. at 319, on Mr. Comer's

part that could justify imposing liability upon him under the eighth amendment.

III.

The Ruarks seek to impose eighth amendment liability upon Don Drury, the jail warden, because of his acknowledgment that he once told his jail security offices just to "lock [Mr. Ruark] up and forget him." The Ruarks contend that that remark demonstrates the personal participation in, and tacit approval of, the events prior to Mr. Ruark's death that would subject Mr. Drury to liability as the supervisor of Cotton Comer. *See, e.g., Angarita v. St. Louis County,* 981 F.2d 1537, 1545 (8th Cir. 1992); *see also Miltier v. Beorn,* 896 F.2d 848, 854 (4th Cir. 1990).

In the portion of its opinion granting summary judgment to Mr. Drury, however, the trial court stated that the Ruarks had "failed to tie this statement into the circumstances surrounding the incident in question" and that no evidence was offered to suggest that the statement "was anything more than an off-hand remark made at some other time that had no bearing on the actions or the state of mind of [Mr. Comer] on the morning in question." We have read carefully Mr. Drury's deposition and have considered carefully the arguments of the Ruarks in that respect. In the circumstances of this case, we agree with the trial court that the Ruarks have failed to establish the existence of a genuine issue of material fact with regard to Mr. Drury's personal involvement in the events surrounding Mr. Ruark's death.

IV.

The Ruarks assert that the 20-minute delay between the time when their son's condition was recognized as an emergency and the time when an ambulance was called was attributable either to Gregg Reed's failure to notify Sheriff Leland Boatwright of the emergency immediately or to Sheriff Boatwright's failure to call an ambulance immediately after being notified by Mr. Reed of the need for one. In either case, the Ruarks argue, such a delay must be characterized as a matter of law as "deliberate indifference," *Estelle v. Gamble*, 429 U.S. 97, 104 (1976), *see also id.* at 106, under the eighth amendment.

In the portion of its opinion granting summary judgment to Mr. Reed, the trial court held that "it cannot be said, as a matter of law, that a twenty-minute delay in securing assistance to have an ambulance called, *in and of itself*, constitutes obduracy and wantonness" (emphasis supplied). In the portion of the opinion granting summary judgment to Sheriff Boatwright, the trial court held that "it cannot be said, as a matter of law, that a twenty-minute delay in calling an ambulance, *without more*," is sufficient to establish that Sheriff Boatwright "acted in callous disregard" of Mr. Ruark's "constitutional right to have medical attention" (emphasis supplied). In the circumstances of this case, we affirm those holdings of the trial court.

V.

Finally, the Ruarks assert that if Cotton Comer had had any training with respect to medical emergencies, he would have been able to tell at an earlier time that Mr.

Ruark's condition was life-threatening. The Ruarks urge that "in light of the duties assigned to [the jail security officers,] the need for . . . training [in that regard] is so obvious, and the [failure to train] so likely to result in the violation of constitutional rights, that the [county] can reasonably be said to have been deliberately indifferent to the need," *id.* at 390, *see also id.* at 388-89, 392. The Ruarks contend, therefore, that the county's failure to train Mr. Comer in that respect was so "closely related" to Mr. Ruark's death, *City of Canton v. Harris*, 489 U.S. 378, 391 (1989), as to be "a direct causal link" to that death, *id.* at 385, thus justifying the imposition of liability on the county under the eighth amendment.

The circumstances of this case are unusual. Mr. Comer was faced with an inmate who was known to be hard to wake and who was known to have fallen asleep on occasion with chewing tobacco in his mouth. In light of that history – *i.e.*, considering "the constraints facing" Mr. Comer, *Wilson v. Seiter*, 111 S. Ct. 2321, 2326 (1991), *see also Whitley v. Albers*, 475 U.S. 312, 320 (1986) – we do not believe that any reasonable person could find that Mr. Comer would have reacted differently even if he had had some training with regard to medical emergencies. With that conclusion, we must hold that the Ruarks have failed to establish the existence of a genuine issue of material fact with respect to a causal connection between Mr. Ruark's death and any lack of training by the county for its jail security offices. We therefore affirm the trial court's grant of summary judgment to the county.

V.

For the reasons indicated, we affirm the trial court in all respects.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
SOUTHWESTERN DIVISION

DENNIS RUARK and MARY RUARK,	)	Civil Action
	)	No. 88-5109-CV-
Plaintiffs,	)	SW-8
	)	
v.	)	
	)	
LELAND BOATWRIGHT, et al.,	)	
	)	
Defendants.	)	

ORDER

(Filed June 8, 1993)

Plaintiffs have brought a claim for relief under 42 U.S.C. § 1983. They seek damages from Sheriff Leland Boatwright, Warden Don Drury, Deputy Warden Dick Fehr, Deputy Sheriffs Gregg Reed and Cotton Comer, and Jasper County, Missouri. Plaintiffs allege that Defendants violated the constitutional rights of their son, decedent Dennis Ruark, Jr. (Ruark), while he was confined in the Jasper County Jail. They contend that Defendants failed to obtain medical assistance for their son until his condition was irreversible, thereby causing his death. Plaintiffs have also brought a pendent state law claim under the provisions of R.S.MO. § 537.080(1).

This matter now pends before the Court on Defendants' Motion for Summary Judgment. It is Defendants' position that no one had sufficient knowledge of the gravity of Ruark's situation, and that there was no deliberate indifference to his serious medical needs. Defendants contend that the guards mistook Ruark's condition

for a deep sleep, that Ruark had a history of being difficult to awaken, and that emergency assistance was obtained upon the discovery of his need for medical treatment.

There are well-settled principles in ruling a summary judgment motion. Summary judgment is appropriate when there is no genuine issue of material fact present in the case and judgment should be awarded to the party seeking the motion as a matter of law. Fed. R. Civ. P. 56(c). *E.g., Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Pierce v. Marsh*, 859 F.2d 601, 603 (8th Cir. 1988). As the Supreme Court reiterated in *Celotex*, the summary judgment procedure "is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to secure the just, speedy and inexpensive determination of every action." 477 U.S. at 327. Because summary judgment is a drastic remedy, however, it should not be granted unless the moving party has established the right to a judgment with such clarity that there is no room for controversy. *Umpleby v. United States*, 806 F.2d 812, 814 (8th Cir. 1986). In addition, the party opposing summary judgment motions may not rest upon the allegations in the pleadings. The nonmovant must resist the motion by setting forth specific facts showing there is a genuine issue of fact for trial. Fed. R. Civ. P. 56(e); *Buford v. Tremayne*, 747 F.2d 445, 447 (8th Cir. 1984). A summary judgment motion is to be viewed in the light most favorable to the opposing party who also must receive the benefit of all reasonable inferences to be drawn from underlying facts. *Agristor Leasing v. Farrow*, 826 F.2d 732, 734 (8th Cir. 1987).

In ruling a motion for summary judgment, the court does not decide material factual issues, rather it determines whether or not they exist. *Columbia Union Nat'l Bank v. Hartford Accident & Indem. Co.*, 669 F.2d 1210, 1212-13 (8th Cir. 1982). Summary procedures are appropriate where the issues for resolution are primarily legal rather than factual. *Lomar Wholesale Grocery, Inc. v. Dieter's Gourmet Foods, Inc.*, 824 F.2d 582, 585 (8th Cir. 1987), *cert. denied*, 484 U.S. 1010 (1988). Issues of fact must be material to a resolution of the dispute between the parties; where the only disputed issues of fact are immaterial to the resolution of the legal issues, summary judgment is appropriate. *Id.* at 585.

The facts surrounding this case began when Ruark, who was incarcerated at the Jasper County Jail, was allowed to leave the jail on a work release program to visit his grandfather the morning of September 29, 1985. He returned to the jail that evening between 6:00 and 7:00, was routinely strip searched, and returned to his bunk in the B Dormitory. The next morning, Defendant Deputy Sheriff Cotton Comer tried to awaken Ruark several times during routine wake-up calls, beginning at 6:00 a.m. Ruark did not wake up. Defendant Deputy Sheriff Gregg Reed and Comer then examined Ruark, and notified Sheriff Boatwright of the need to call an ambulance. The call was made at 6:50 a.m., according to the transmitter log. Ruark was taken to McCune-Brooks Hospital in Joplin, Missouri, at approximately 7:00 a.m., where he was pronounced dead a short time later.[1]

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[1] According to the Jasper County Coroner's Autopsy Report, and the Laboratory Report from the University of

Plaintiffs seek to recover via section 1983 under the Eighth Amendment, which prohibits cruel and unusual punishment. Cruel and unusual punishment constitutes the "unnecessary and wanton infliction of pain" proscribed by the Eighth Amendment. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976), *reh'g denied*, 429 U.S. 1066 (1977), *quoting Gregg v. Georgia*, 428 U.S. 153, 173 (1976). To demonstrate an Eighth Amendment violation on the basis of inadequate medical care, "a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs. It is only such indifference that can offend 'evolving standards of decency' in violation of the Eighth Amendment." *Estelle*, 428 U.S. at 106 (footnote omitted). The law is clear that neither medical malpractice, nor negligence in providing adequate medical care, rise to the level of an Eighth Amendment violation. *Id.*, at 105-06; *Taylor v. Bowers*, 966 F.2d 417, 422 (8th Cir. 1992), *appeal pend'g*, ___ U.S. ___ (1993). "Mere negligence, inadvertent failure to provide adequate medical care and gross negligence do not support a claim of medical mistreatment under the eighth amendment." *Bellecourt v. United States*, 784 F. Supp. 623,

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Missouri Toxicology Laboratory, Ruark's blood morphine level at the time of his death was 2.0 micrograms/ml. Urine drug screening detected a number of drugs including morphine, and "[t]he immediate cause of death [was] felt to be hypoxia secondary to severe acute bilateral aspiration pneumonia related to an impaired state of consciousness due to an elevated blood morphine level." (Autopsy, at 4). Although Plaintiffs have objected to Defendants' reliance on the FBI Report, which includes these two reports, the Court finds that the autopsy and toxicology report would be admissible under F. R. Civ. P. 803(6), as records regularly kept in the course of business.

634 (D.Minn. 1992). "It is obduracy and wantonness, not inadvertence or error in good faith, that characterize the conduct prohibited by the Cruel and Unusual Punishment Clause. . . . " *Whitley v. Albers*, 475 U.S. 312, 319 (1986). The Supreme Court has reiterated that a plaintiff must demonstrate that prison officials had a culpable state of mind in order to establish an Eighth Amendment violation. *Wilson v. Seiter*, ___ U.S. ___, 111 S. Ct. 2321, 2328 (1991).

Defendants have asserted that they are entitled to qualified immunity. The law governing the qualified immunity defense is well-established. *Givens v. Jones*, 900 F.2d 1229, 1231 (8th Cir. 1990). "Government officials are shielded from liability under section 1983 for the performance of discretionary functions 'insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.' " *Taylor*, 966 F.2d at 420, *quoting Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). In order to constitute "clearly established law," the parameters of the right must be clear to the extent that a reasonable official would understand that his or her conduct violates that right. *Taylor*, 966 F.2d at 420. When a plaintiff fails to allege a violation of clearly established law, a defendant pleading qualified immunity is entitled to summary judgment before discovery begins. *Id.* When the plaintiff makes competent allegations of acts that violate clearly established law, summary judgment is appropriate if discovery fails to uncover evidence sufficient to create a genuine factual dispute as to whether defendant's conduct violated clearly established law because defendant committed those acts. *Id.*

In the instant case, Plaintiffs have alleged that Defendants were deliberately indifferent to their son's serious medical needs by their delay in obtaining assistance or calling an ambulance for Ruark, and that Jasper County failed to properly train jail personnel in how to respond to a medical emergency.

While an alleged delay in medical treatment is not sufficient, in and of itself, to state a claim of deliberate indifference, *Id.* at 421, that indifference may be manifested by prison guards who intentionally deny or delay access to medical care. *E.g., Estelle,* 429 U.S. at 104-05 & n.11 (citing cases that alleged delays of two and a half hours, twelve hours, and thirteen hours); *Boswell v. Sherburne County,* 849 F.2d 1117, 1121-22 (8th Cir. 1988) (cases holding that delay in treatment could constitute deliberate indifference "are familiar landmarks on the legal terrain since *Estelle* was decided in 1976."). Deliberate indifference may also be inferred when prison guards ignore without explanation a serious medical condition that is known or obvious to them. *Johnson-El v. Schoemehl,* 878 F.2d 1043, 1055 (8th Cir. 1989); *Brown v. Hughes,* 894 F.2d 1533, 1538 (11th Cir. 1990).

Regarding the allegations of failure to train on the part of Jasper County, in order to establish liability against a municipal body, the plaintiff must show that the acts or omissions of policymakers or supervisory personnel evidence deliberate indifference to the rights of its inhabitants. *Canton v. Harris,* 489 U.S. 378, 387-90 (1989). That standard could be met if a city's training program was so obviously inadequate that a violation of constitutional rights would likely result. *Id.; see e.g., Warren v. Lincoln,* 816 F.2d 1254, 1263 (8th Cir. 1987); *Patzner v.*

Burkett, 779 F.2d 1363, 1367 (8th Cir. 1985). It is clear, however, that for liability to attach, "the identified deficiency in a city's training program must be closely related to the ultimate injury." *Canton*, 489 U.S. at 391.

Having reviewed the case law existing at the time of the incident in question, the Court finds that it was clearly established at that time that an intentional delay in providing emergency care could constitute deliberate indifference to an inmate's serious medical needs in violation of the Eighth Amendment. Similarly, it was clearly established law that failure to properly train prison guards for emergency situations could state an Eighth Amendment violation. Therefore, Plaintiffs' basic allegations are sufficient to state a violation of clearly established law. If Defendants are to be shielded from liability with the defense of qualified immunity, it must be because Plaintiffs have failed to uncover sufficient evidence to create a genuine issue as to whether Defendants committed the allegedly unlawful acts.

In response to the summary judgment motion,[2] Plaintiffs assert that there are material factual disputes regarding the following: whether Defendant Deputy Sheriff Comer was aware of the seriousness of Ruark's condition; whether Defendant Deputy Sheriff Reed sought help immediately upon realizing that Ruark was in distress, or whether he delayed seeking help for approximately 20

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[2] Plaintiffs have objected to the admissibility of the FBI report, which Defendants used to support the summary judgment motion. Because the Court has not relied upon the FBI report, it is not necessary to address the merits of Plaintiffs' argument on its admissibility.

minutes; whether, alternatively, Defendant Sheriff Boatwright called an ambulance immediately upon learning from Reed that Ruark was in peril, or if he waited to call the ambulance for 20 minutes; whether Defendant Warden Don Drury is liable because he ordered the guards to forget about Ruark if he could not be awakened; and whether Defendant Jasper County failed to provide proper training to county employees regarding medical emergencies.[3]

Before addressing the specific allegations against each of the Defendants, it is of paramount importance in a deliberate indifference case to be mindful that, if generally construed as a claim of negligence, Plaintiffs' claims must fail, as negligence and even gross negligence are not actionable under section 1983. *E.g., Taylor*, 966 F.2d at 422; *Bellecourt*, 784 F. Supp. at 634. There is no dispute in this case that approximately one hour elapsed from the time of the first wake-up call to the time that Ruark departed by ambulance for the hospital. From 6:00 a.m. until approximately 6:15 to 6:30 a.m., it appeared that Ruark was merely difficult to awaken. As testified to by Defendant Drury in his deposition, this was typically the case with Ruark, and all the guards had problems awakening him. (Drury Deposition at 55, 71-72). Even assuming that Ruark's condition was recognized as serious at 6:15 a.m.,

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[3] The Court notes that Plaintiffs did not make specific allegations against Defendant Deputy Warden Dick Fehr in their complaint or amended complaint. They also did not raise or address the liability of Defendant Fehr in their response to the summary judgment motion. Accordingly, Defendants' summary judgment motion as it pertains to Defendant Fehr will be granted without further discussion.

the Court finds that there is simply not a material factual dispute regarding whether Defendants Comer, Reed, and Boatwright's responses were so unreasonable as to "shock the conscience" or whether they exhibited callous disregard for Ruark's serious medical needs. There is no evidence, which would create a triable issue of fact, that those Defendants acted intentionally to delay medical treatment once it became obvious that medical treatment was necessary.

Plaintiffs' basic contention regarding Defendant Comer is that he was aware that Ruark's condition was serious at 6:15 a.m., and that he elected to do nothing. The facts show, however, that Comer first tried to awaken Ruark by routine methods, that he sought assistance when Ruark did not wake up and he observed the brown fluid and the heavy breathing, which he noticed at about 6:15 a.m., and that he then examined Ruark with Reed's assistance. Comer's actions demonstrate an increasingly progressive response on his part to a situation that was initially perceived to be normal. There is no evidence, moreover, that Defendant knew of the seriousness of Ruark's condition or that it would have been apparent to a reasonable person in his position that Ruark was in need of emergency treatment until sometime after 6:15 a.m., at the earliest. Based on the record before the Court, and construing the facts in favor of the non-moving party, there is no material factual dispute regarding whether Comer either intentionally delayed obtaining medical assistance for Ruark when he became aware that the decedent needed treatment, or ignored Ruark's serious medical needs. Because Plaintiffs' allegations fall short of raising a material factual dispute that he was deliberately

indifferent to Ruark's condition, Defendant Comer is entitled to summary judgment on the basis of qualified immunity.

Turning to Defendant Reed, Plaintiffs contend that he recognized at 6:30 a.m. that Ruark's condition was serious, but that there is a genuine issue regarding whether he delayed getting help because the Sheriff's transmitter log indicates that the call for an ambulance did not go out until 6:50 a.m. Even assuming that Defendant Reed was responsible for the alleged delay, this Court finds that it cannot be said, as a matter of law, that a twenty-minute delay in securing assistance to have an ambulance called, in and of itself, constitutes obduracy and wantonness, sufficient to state an Eighth Amendment violation. Plaintiffs have alleged no facts sufficient to support a claim of deliberate indifference on the part of Defendant Reed. Accordingly, he is entitled to summary judgment on the basis of qualified immunity.

Plaintiffs allege, alternatively, that Sheriff Boatwright was deliberately indifferent to Ruark's condition because, if Reed did contact his office at 6:30 a.m., then the Sheriff delayed calling an ambulance for twenty minutes. According to the testimony of Sheriff Boatwright, he did not remember whether he called the hospital or the dispatcher did, but "before there was any more talk, in other words to ask why or what was the problem, the call was made immediately to the hospital before anybody said why, where, and all about it." (Deposition of Boatwright at 127). Defendant Boatwright testified that he would respond to a medical emergency in the same manner, regardless of how the emergency arose, and that if there

was any doubt about a prisoner's condition, he or she would be sent to the hospital. (Depo. at 55 and 58).

As the Court has indicated herein, regarding the same allegations against Defendant Reed, it cannot be said, as a matter of law, that a twenty-minute delay in calling an ambulance, without more, is sufficient to state an Eighth Amendment violation. Plaintiffs have set forth no facts sufficient to create a material factual dispute regarding whether Defendant Boatwright acted in callous disregard of Ruark's constitutional right to have medical attention. Accordingly, Defendants' Summary Judgment Motion on behalf of Defendant Boatwright should be granted on the basis of qualified immunity.

Regarding Defendant Drury, Plaintiffs allege that he had instructed the guards to ignore Ruark. According to the deposition testimony of Drury, Ruark was on a work release program, and the guards often had difficulty waking him up to go out on work release. (Drury Deposition at 55, 71-72). All of the guards with responsibility for waking Ruark had complained about it. (Drury Depo. at 71-72). Drury testified that he told them that if Ruark was interested in going to work, he would get up and go, and therefore, the guards should "[p]ut him back there and forget the work release." (Drury Depo. at 72). According to Drury, however, the guards nevertheless would continue to try, 5 or 6 times, to shake Ruark and wake him up, and eventually, would wake him up to go to work. (Depo. at 72-73).

Plaintiffs have attempted to create a factual issue regarding the statement made by Drury, but have failed to tie this statement into the circumstances surrounding

the incident in question. In fact, the actions of Comer in continuing to try to awaken Ruark support Drury's testimony that the guards essentially discounted his suggestion regarding "forgetting about" Ruark. There is no evidence that the statement made by Drury was anything more than an off-hand remark made at some other time that had no bearing on the actions or the state of mind of the other Defendants on the morning in question. Plaintiffs have produced no evidence that would create a genuine factual issue regarding whether Drury instructed the prison guards to ignore Ruark if he presented serious medical problems. They have failed to produce evidence, other than rank speculation, that the statement made by Drury caused the other Defendants to act in a manner that was deliberately indifferent to Ruark's right to medical care. They have failed, finally, to produce any evidence that Drury, personally, was deliberately indifferent to Ruark's serious medical needs. Accordingly, the Court finds that Defendant Drury is entitled to summary judgment on the basis of qualified immunity.

For the reasons set forth herein, Plaintiffs have failed to present sufficient evidence to withstand the motion for summary judgment. Accordingly, Defendants Boatwright, Comer, Reed, and Drury are entitled to summary judgment on the basis of qualified immunity.

Turning to Jasper County, because the Court finds that there is no material factual dispute regarding whether the sheriff, deputies, and warden acted with deliberate indifference, there is no triable issue of fact regarding whether Jasper County's failure to train reflects deliberate indifference to county jail inmates' constitutional rights. Because there has been no constitutional

deprivation, there can be no showing that a violation was caused by a policy of inadequate training. *Canton*, 489 U.S. at 389-90 & n.9. Given that Plaintiffs have failed to raise a material dispute regarding whether a deficiency in training resulted in deliberate indifference to their son's serious medical needs, summary judgment is appropriate for Jasper County.

Plaintiffs have also filed a pendent state law claim under Missouri's wrongful death statute. The decision to continue jurisdiction of a state claim that relates to and stems from the same common facts as the federal claim is within the Court's discretion. *See Finz v. Schlesinger*, 957 F.2d 78, 83-84 (8th Cir. 1992). Having fully reviewed the record and based on the fact that the basis of Plaintiffs' federal claims has been extinguished, the Court declines to exercise jurisdiction over the pendent state law wrongful death claim.

After reviewing the file in the instant case, the Court finds, as a matter of law and viewing the facts in the light most favorable to Plaintiffs, that there is no genuine issue of material fact regarding Defendants having acted with deliberate indifference to Ruark's serious medical needs. Accordingly, Defendants' motion for summary judgment should be granted. It is therefore

ORDERED that Defendants' motion for summary judgment be, and it is hereby, granted. It is further

ORDERED that Plaintiffs' pendent state law claim be, and it is hereby, dismissed.

/s/ James C. England
JAMES C. ENGLAND
United States Magistrate

Date: June 8, 1993

AFFIDAVIT

Comes now Mark Reeder, being duly sworn upon his oath, and states as follows;

1. That Affiant is a private investigator who was hired by counsel for Plaintiffs to investigate the circumstances surrounding the death of Dennis Ruark, Jr.;

2. That on March 7, 1989, Affiant contacted Robert "Cotton" Comer by going to his residence at 200 North McGregor Street, Carthage, Missouri;

3. That Affiant was accompanied on his trip to the residence of Mr. Comer by Dennis Ruark, Sr.;

4. That Affiant asked Mr. Comer a series of questions pertaining to the death of Dennis Ruark, Jr., including a question about how he found Dennis Ruark, Jr. on the morning of September 30, 1985;

5. That Mr. Comer told Affiant that he found Dennis Ruark, Jr., at 6:15 a.m. before breakfast in his bunk;

6. That Affiant asked Mr. Comer how Dennis Ruark, Jr. appeared;

7. That Mr. Comer told Affiant that Dennis Ruark, Jr., was choking and could not breathe;

8. That to the best of the knowledge of Affiant, Robert Comer was not a Defendant to the instant cause at the time he met with Mr. Comer on March 7, 1989.

FURTHER AFFIANT SAITH NOT.

/s/ Mark D. Reeder
MARK REEDER

STATE OF MISSOURI)
) ss:
COUNTY OF JACKSON)

Subscribed and sworn to before me this 7th day of May, 1992.

/s/ Kim Edmondson
Notary Public

Supreme Court, U.S.
FILED
JUN 24 1994
OFFICE OF THE CLERK

(2)

No. 93-1881

In The

Supreme Court of the United States

October Term, 1993

DENNIS RUARK, SR. and MARY RUARK,

Plaintiffs/Petitioners,

vs.

LELAND BOATWRIGHT,
GREGG REED and ROBERT COMER,

Defendants/Respondents.

Petitioner For Writ Of Certiorari
To The United States Court of Appeals
For The Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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20 pp

QUESTIONS PRESENTED FOR REVIEW

I. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED, BECAUSE THE PETITIONER FAILED TO SET FORTH SPECIAL AND IMPORTANT REASONS SUFFICIENT TO GRANT THE SAME.

A. THE EIGHTH CIRCUIT CORRECTLY APPLIED THIS COURT'S STANDARD, FOR EIGHTH AMENDMENT COMPLAINTS, AS SET FORTH IN *ESTELLE V GAMBLE*, 429 U.S. 97 (1976) AND *WHITLEY V ALBERS*, 475 U.S. 312 (1986); and

B. THE HOLDING OF THE EIGHTH CIRCUIT DOES NOT REFLECT CONFUSION OF THE APPELLATE COURTS IN DEFINING THE PHRASE "DELIBERATE INDIFFERENCE".

II. THE EIGHTH CIRCUIT CORRECTLY AFFIRMED THE TRIAL COURT'S GRANTING OF SUMMARY JUDGMENT TO ALL DEFENDANTS, IN THAT PETITIONERS ALLEGED INSUFFICIENT FACTS, EVEN WHEN VIEWED IN THE LIGHT MOST FAVORABLE TO PETITIONERS, TO SUPPORT AN EIGHTH AMENDMENT VIOLATION OF INADEQUATE MEDICAL CARE, OR DELIBERATE INDIFFERENCE TO A KNOWN SERIOUS MEDICAL NEED.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT OF CASE 1

SUMMARY OF ARGUMENT 4

ARGUMENT 5

I. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED, BECAUSE THE PETITIONER FAILED TO SET FORTH SPECIAL AND IMPORTANT REASONS SUFFICIENT TO GRANT THE SAME 5

(A). THE EIGHTH CIRCUIT CORRECTLY APPLIED THIS COURT'S STANDARD, FOR EIGHTH AMENDMENT COMPLAINTS, AS SET FORTH IN *ESTELLE v. GAMBLE*, 429 U.S. 97 (1976) AND *WHITLEY v. ALBERS*, 475 U.S. 312 (1986) 7

(B). THE HOLDING OF THE EIGHTH CIRCUIT DOES NOT REFLECT CONFUSION OF THE APPELLATE COURTS IN DEFINING THE PHRASE "DELIBERATE INDIFFERENCE" 10

II. THE EIGHTH CIRCUIT CORRECTLY AFFIRMED THE TRIAL COURT'S GRANTING OF SUMMARY JUDGMENT TO ALL DEFENDANTS, IN THAT PETITIONERS ALLEGED INSUFFICIENT FACTS, EVEN WHEN VIEWED IN THE LIGHT MOST FAVORABLE TO PETITIONERS, TO SUPPORT AN EIGHTH AMENDMENT VIOLATION OF INADEQUATE MEDICAL CARE, OR DELIBERATE INDIFFERENCE TO A KNOWN SERIOUS MEDICAL NEED 12

CONCLUSION 16

TABLE OF AUTHORITIES

Page

CASES

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 91 L.Ed.2d 202 (1986) 15, 16

Bellecourt v. United States, 784 F.Supp. 623 (D. Minn. 1992) 9

Duckworth v. Franzen, 780 F.2d 645 (7th Cir. 1985) 11, 12

Estelle v. Gamble, 429 U.S. 97 (1976) 7, 8, 11

Howell v. Evans, 922 F.2d 712 (11th Cir. 1991) 11

Hudson v. McMillan, 503 U.S. ___, 117 L.Ed.2d 156 (1992) 10

Lomar Wholesale Grocery, Inc. v. Dieter's Gourmet Foods, Inc., 824 F.2d 582 (8th Cir. 1987), cert. denied, 484 U.S. 1010 (1988) 13

Rellegert v. Cape Girardeau County, Missouri, 924 F.2d 794 (8th Cir. 1991) 11, 12

Whitley v. Albers, 475 U.S. 312 (1986) 7, 8, 9, 10

Wilson v. Seiter, 501 U.S. ___, 115 L.Ed.2d 271 (1991) 8

RULE

Rules of the Supreme Court, Rule 10 5

STATEMENT OF CASE

Plaintiffs/petitioners brought a claim for relief under Title 42 USC §1983 claiming damages from defendants/respondents for the death of their son, decedent Dennis Ruark, Jr. (Ruark). Ruark died on September 30, 1985, while he was confined in the Jasper County Jail. The cause of action was filed by plaintiffs on September 28, 1988, against Sheriff Leland Boatwright, Warden Don Drury, Deputy Warden Dick Fair, Deputy Sheriffs Gregg Reed and Cotton Comer, and Jasper County, Missouri. Plaintiffs alleged defendants failed to obtain medical assistance for their son until his condition was irreversible, thereby causing his death.

The facts surrounding plaintiffs' complaint began when Ruark, who was incarcerated at the Jasper County Jail, was allowed a one day leave on a work release program the morning of September 29, 1985. Unknown to the defendants, prior to his return to the jail Ruark obtained and consumed what turned out to be a lethal dose of liquid morphine. Ruark returned to the jail that evening, between 6:00 and 7:00 p.m., was routinely strip searched, and returned to his bunk in B Dormitory of the jail. "B" Dormitory housed approximately sixteen inmates. (Pl. App. 134, Jail Record, Pl. App. 39). Shortly thereafter, Ruark retired for the evening.

The next morning, over approximately a one hour period of time, between 6 a.m. and 7 a.m., Defendant Comer tried to awaken Ruark several times during routine wake up calls. The first call came, according to Defendant Comer's FBI interview, taken November 25, 1985, (Pl. App. 83) and Comer's deposition, taken April

30, 1992 (Pl. App. 155), when Comer "hollered" to the inmates to wake up at 6:00 a.m. as usual. He returned at 6:15 a.m. to check on the work release inmates after he was through feeding breakfast to all inmates. Finding Ruark still asleep, Comer shook him at which time he reported receiving a mumble in reply. (Pl. App. 156-158). He noted at 6:15 that Ruark was breathing "raspily". (Pl. App. 156).

Comer advised he left the cell on other duties and returned at around 6:30 a.m. to try to awaken Ruark one more time. When he returned, he observed Ruark still asleep, lying in a different position and breathing "blubberly". (Pl. App. 158). At this point, Comer reports he began to suspect Ruark may have gotten drunk during his release to relatives the previous day and, seeing the spittle coming from his mouth, may have gone to sleep with tobacco in his mouth. (Pl. App. 84; Pl. App. 162). Comer "became alarmed and summoned the other guard on duty, Gregg Reed to go get help." (Pl. App. 164 and 166).

Although he does not recall the time, Defendant Reed first learned of a problem with Ruark after Comer notified him he was having trouble waking Ruark for work release. (Pl. App. 211). When he entered the dormitory, Reed found Ruark laying on his stomach. (Pl. App. 212). He observed Ruark had "labored breathing" and was "warm to the touch". (Pl. App. 212). He took Ruark's pulse, checked his pupils to react to light and at that time observed brown fluid at the corner of his lips and nose. (Pl. App. 212 and 214).

Reed testified he did not administer any kind of medical assistance at that time, in that his training as an EMT was that " . . . you make no attempt to render aid unless the respirations or the pulse stops." (Pl. App. 216). Ruark had both. (Pl. App. 216). Instead, Reed testified he went to Sheriff Boatwright and advised there was a "real sick" inmate who needed assistance. (Pl. App. 216-219).

Boatwright testified he did not recall whether he or the jail dispatcher called the hospital, but he knew following Reed's warning the call was made immediately "before anybody said why, where, and all about it." (Pl. App. 363). Thereafter, although Ruark received emergency care, he died a short time later at approximately 7:36 a.m. on September 30, 1985. (Pl. App. 99-100).

The autopsy report (Pl. App. 31-34) states:

> The blood morphine level would be consistent with impaired consciousness. **The immediate cause of death is felt to be hypoxia secondary to severe acute bilateral aspiration pneumonia related to an impaired state of consciousness due to an elevated blood morphine level.** (Emphasis added).

The findings in the lungs, of aspirated gastric debris, combined with the coroner's opinion of the immediate cause of death, reveal Ruark's system simply shut down due to the drug overdose.

Ruark had been consistently difficult to awaken in the morning for work release. (Pl. App. 40, 53 and 497-499). A defendant in the early proceedings of this case testified:

> It's just that I got complaints by quite frankly every security officer that worked – that was responsible for waking him up. They said they could not get him woke up. (Pl. App. at 498).

On the morning of September 30, 1985, Reed and Comer saw nothing more than the same behavior Ruark had exhibited on many occasions prior thereto, (i.e., refusing to get up for work release). They had absolutely no reason to suspect anything out of the ordinary and were not advised of anything out of the ordinary by the other inmates in Dorm B. To the contrary, one fellow inmate even went so far as to advise Reed that Ruark was "just sleeping heavy" and to "leave him alone". (Pl. App. 70).

SUMMARY OF ARGUMENT

A petition for Writ of Certiorari will be granted " . . . **only when there are special and important reasons therefore.**". Petitioners attempt to argue the Eighth Circuit Court of Appeals applied a different standard of "deliberate indifference", to their Eighth Amendment claim, and further attempt to argue the existence of a conflict of opinions among the various United States Circuit Courts of Appeal as to the proper definition of "deliberate indifference". The United States Supreme Court and Courts of Appeal use a variety of adjectives, nouns and adverbs to describe the culpable state of mind required for a successful Eighth Amendment claim. The use of various adjectives, nouns and adverbs does not establish a true conflict among the courts of appeal sufficient to merit a Writ of Certiorari.

The Eighth Circuit Court of Appeals properly applied this Court's standard for the burden of proof in a Title 43 §1983 cause of action, alleging a deliberate indifference to a known serious medical need. Accordingly the Eighth Circuit's affirmation of the trial court's summary judgment was appropriate.

ARGUMENT

REASONS FOR DENYING THE WRIT OF CERTIORARI

I. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED, BECAUSE THE PETITIONER FAILED TO SET FORTH SPECIAL AND IMPORTANT REASONS SUFFICIENT TO GRANT THE SAME.

Rule 10 of the Rules of the Supreme Court sets forth "Considerations Governing Review on Writ of Certiorari". The Rule clearly states a Petition for Writ of Certiorari will be granted " . . . **only when there are special and important reasons therefore.**".

Supreme Court Rule 10 sets forth three main considerations under which a writ will be considered. Of the three, the only possible consideration that could apply to the case now before the Court is Rule 10.1(a) providing that a Writ of Certiorari may be granted when a court of appeals renders a decision in conflict with the decision of another court of appeals.

In the case at issue, the decision of the Eighth Circuit Court of Appeals is not in conflict with any other appellate court or Supreme Court decision, nor is it a unique or

unusual opinion. Respondent would submit to this Court that there are neither special nor important reasons to burden this Court with review of the above-styled case. Accordingly, the petition for Writ of Certiorari must be denied.

Petitioner's attempt to bootstrap an argument in support of their Petition, alleging the Eighth Circuit incorrectly required them to prove "both deliberate indifference and wantonness and obduracy on their part". Petitioners' actually state at page 11 of their Petition:

> in other words the Eighth Circuit imposed a requirement of wantonness and obduracy *in addition* to deliberate indifference. (Petitioner's emphasis).

A careful reading of the Eighth Circuit opinion reveals Petitioners' argument is simply unfounded.

Petitioners attempt to distinguish levels of deliberate indifference, running from a "particularly high standard of proof" of wantonness and obduracy to a "less demanding standard" of deliberate indifference. Respondents strongly disagree.

The appellate court decisions, interpreting the legal phrase "deliberate indifference", simply utilize various terms to describe the requisite state of mind to establish an Eighth Amendment violation. The appellate courts are not creating different levels of deliberate indifference, or different tests; rather they are confirming this court's holding that it takes something more than mere negligence, such as "obduracy and wantonness", to constitute deliberate indifference.

Regardless of how "deliberate indifference" is defined or described, both the trial court and the Eighth Circuit Court of Appeals clearly stated in their opinion they simply did not find sufficient evidence with which to show a culpable state of mind on the part of the respondents.

(A) THE EIGHTH CIRCUIT CORRECTLY APPLIED THIS COURT'S STANDARD, FOR EIGHTH AMENDMENT COMPLAINTS, AS SET FORTH IN *ESTELLE V. GAMBLE*, 429 U.S. 97 (1976) AND *WHITLEY V. ALBERS*, 475 U.S. 312 (1986).

In affirming summary judgment as to Reed, Boatwright and Comer, the Eighth Circuit Court of Appeals held that it could not conclude these individuals acted in such a way that constituted "obduracy and wantonness." (A-10)[1]. Petitioners now argue, the Eighth Circuit has carved a new standard to determine whether a prisoner's Eighth Amendment right was violated. Petitioners contend the Eighth Circuit "tacked on an additional requirement that the delay in obtaining medical help 'must also be prompted by obduracy and wantonness, not inadvertence or error in good faith.' " (Brief at 9, citing (a-7)). Respondents strongly disagree with petitioners' interpretation of the Eighth Circuit opinion.

Failure to provide medical care for a prisoner may be defined as "cruel and unusual punishment" and violative of the Eighth Amendment. *Estelle v. Gamble*, 429 U.S. 97

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[1] All references to "A" will refer to Petitioners' appendix as set forth in their Petition for Writ of Certiorari.

(1976). This Court noted in *Estelle*, that "deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain' proscribed by the Eighth Amendment." 429 U.S. at 104 (citations omitted). The terms "deliberate indifference", "obduracy" and "wantonness" are terms the Supreme Court has used in defining the parameters of "cruel and unusual punishment." In *Whitley v. Albers*, 475 U.S. 312, 319 (1986), this Court noted:

> [t]o be cruel and unusual punishment, conduct that does not purport to be punishment at all must involve more than ordinary lack of due care for the prisoner's interests or safety. . . . It is obduracy and wantonness, not inadvertence or error in good faith, that characterize the conduct prohibited by the Cruel and Unusual Punishments Clause, whether that conduct occurs in connection with establishing conditions of confinement, supplying medical needs, or restoring official control over a tumultuous cell block.

It has long been held by this Court that in order to demonstrate an Eighth Amendment violation on the basis of inadequate medical care, "a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." *Estelle v. Gamble*, 429 U.S. 97, 106 (1976). A plaintiff *must* demonstrate defendant's "culpable state of mind", or an intent to deny medical treatment to a known serious medical need, in order to establish an Eighth Amendment violation on the basis of inadequate medical care. *Wilson v. Seiter*, 501 U.S. ___, 115 L.Ed. 2d. 271 (1991). Negligence, even gross negligence, or error in good faith is not sufficient to support a claim of medical mistreatment under the

Eighth Amendment. *Bellecourt v. United States*, 784 F.Supp. 623, 634 (D. Minn. 1992); *Whitley v. Albers*, 475 U.S. 312, 319 (1986).

Like the Supreme Court in *Whitley*, the Eighth Circuit in the instant cause has used the terms "wantonness", "obduracy" and "deliberate indifference" interchangeably. Using interchangeable words does not change the underlying standard provided by this Court.

The lower courts analyzed the conduct of the three respondents individually. As to Respondent Comer, the Eighth Circuit held:

> we also agree with the trial court that the Ruarks have failed to establish the existence of a genuine issue of material fact with respect to any "obduracy and wantonness," *Whitley v. Albers*, 475 U.S. at 319 . . . " (A-8).

In other words, Respondent Comer was not "deliberately indifferent" to Mr. Ruark's medical needs, therefore Respondent Comer's conduct could not be defined as "cruel and unusual punishment."

As to Respondents Reed and Boatwright, the Eighth Circuit affirmed the trial court's holding that a twenty-minute delay in calling an ambulance, in and of itself, does not constitute obduracy and wantonness nor does it establish that Respondent Boatwright

> 'acted in callous disregard' of Mr. Ruark's 'constitutional right to have medical attention.' (A-10)

In other words, Respondents Reed and Boatwright cannot be characterized as being "deliberately indifferent" to Mr. Ruark's medical needs.

In their brief, petitioners implied the Eighth Circuit incorrectly relied on *Whitley v. Albers*, 475 U.S. 312 (1986), a prison riot case, because the *Whitley* Court defined wantonness as force that was "maliciously and sadistically for the very purpose of causing harm." *Whitley*, 475 U.S. at 320-321. Petitioners contend, therefore, that to be forced to prove "obduracy and wantonness", as defined in *Whitley*, establishes an additional, or higher hurdle for claimants to overcome. (Pet.Brief at 11). Respondents disagree with petitioners' argument.

The Eighth Circuit cited *Whitley* as a case that established the parameters of conduct that would violate a prisoner's right to be free from Cruel and Unusual Punishment. The lower court did not analyze Ruark's need for medical treatment, by defining the terms "wantonness" and "obduracy" in prison riot cases such as the case in *Whitley* and *Hudson v. McMillian*, 503 U.S. ___, 117 L.Ed.2d 156, 165 (1992). The Eighth Circuit merely applied the dicta in the *Whitley* opinion whereby the Supreme Court analyzed the definition of "wantonness" and "obduracy" in different prison contexts, including failure to provide medical treatment and failure to control a "tumultuous cell block".

(B) THE HOLDING OF THE EIGHTH CIRCUIT DOES NOT REFLECT CONFUSION OF THE APPELLATE COURTS IN DEFINING THE PHRASE "DELIBERATE INDIFFERENCE"

In addition to asserting the Eighth Circuit created a new standard applicable to an Eighth Amendment claim, petitioners also contend there is "generalized confusion"

among the circuit courts as to the definition of "deliberate indifference." Like this Court in *Estelle,* supra, circuit courts have defined the phrase "deliberate indifference" by describing various factual situations that may or may not qualify as "deliberate indifference". In *Estelle,* this Court noted indifference was manifested:

> by prison doctors in their response to prisoners' needs or by prison guards in intentionally denying or delaying access to medical care. *Estelle,* at 105.

Accidental or inadvertent failure to provide medical care cannot be construed as "deliberate indifference", nor can it be construed as "an unnecessary and wanton infliction of pain." *Id.*

In *Duckworth v. Franzen,* 780 F.2d 645 (7th Cir. 1985), the Seventh Circuit illustrates the meaning of "deliberate indifference" by providing factual examples. The Seventh Circuit noted that if prison staff merely misdiagnosed a prisoner's illness, thinking it was trivial, and consequently the prisoner dies, such conduct "would not be punishment in any accepted meaning of the word, even if the diagnosis was negligent." *Duckworth,* at 652. In *Howell v. Evans,* 922 F.2d 712 (11th Cir. 1991), the Eleventh Circuit stated a plaintiff, or plaintiffs, could demonstrate a prison official's actions violated the standard set forth in *Estelle* by demonstrating that the facts were similar to factual situations of prior cases which found "deliberate indifference". *Howell,* at 719-720. In *Rellegert v. Cape Girardeau County, Missouri,* 924 F.2d 794 (8th Cir. 1991), the Eighth Circuit analyzed the definition of "deliberate" as it relates to inmate suicide cases when it noted:

> We have considered the facts of this case vis-a-vis the many appellate decisions to which we have cited in others arising from inmate suicides. While we conclude that the laws clearly establish that jailers must take measures to prevent inmate's suicide once they know of the suicide risk, we cannot say that the law is established with any clarity as to what those measures must be. *Rellegert* at 797.

While it is true the Seventh Circuit Court of Appeals in *Duckworth, supra,* points out the term "deliberate indifference" is not self-defining, much like the phrases "substantive due process" or "all deliberate speed", the fact that the circuit courts use a variety of adjectives, nouns and adverbs to describe "deliberate indifference" does not rise to the level of conflicting decisions for which this Court would grant a Writ of Certiorari.

II. THE EIGHTH CIRCUIT CORRECTLY AFFIRMED THE TRIAL COURT'S GRANTING OF SUMMARY JUDGMENT TO ALL DEFENDANTS, IN THAT PETITIONERS ALLEGED INSUFFICIENT FACTS, EVEN WHEN VIEWED IN THE LIGHT MOST FAVORABLE TO PETITIONERS, TO SUPPORT AN EIGHTH AMENDMENT VIOLATION OF INADEQUATE MEDICAL CARE, OR DELIBERATE INDIFFERENCE TO A KNOWN SERIOUS MEDICAL NEED.

Petitioner's second issue for consideration argues that Eighth Circuit incorrectly applied the test for granting summary judgment by refusing to consider evidence

of an affidavit prepared by petitioner's investigator. Petitioner argues "the Eighth Circuit implied that the affidavit was too incredible to be believed . . . (A-8)." Even a cursory reading of page A-8 reveals the 8th Circuit did in fact consider the affidavit when it stated:

> Even if we were to hold, moreover, that a genuine issue of material fact existed with respect to Mr. Ruark's condition at 6:15 a.m., we also agree with the trial court that the Ruarks have failed to establish the existence of a genuine issue of material fact with respect to any 'obduracy and wantonness,' *Whitley v. Albers*, 475 U.S. at 319, on Mr. Comer's part that could justify imposing liability on him under the eighth amendment. (A-8, 9).

In other words, even assuming the affidavit to be true and correct, the petitioners failed to establish the state of mind required to impose liability under the Eighth Amendment.

Although petitioners may have made competent allegations of an Eighth Amendment violation in their initial pleadings, summary judgment is appropriate if the subsequent discovery fails to uncover sufficient evidence to support those allegations. *Lomar Wholesale Grocery, Inc. v. Dieter's Gourmet Foods, Inc.*, 824 F.2d 582, 585 (8th Cir. 1987), *cert. denied*, 484 U.S. 1010 (1988). Petitioners had the burden of establishing, with sufficient evidence, a "genuine factual dispute" as to whether or not the conduct of respondents Comer, Reed and Boatwright, was deliberately indifferent to Ruark's known, serious medical need. Petitioners failed to produce such evidence.

Respondents would point out there was essentially no dispute in the basic facts surrounding this case. Both parties agree Ruark was released from jail on September 29, 1985, whereupon he gained access to a quantity of narcotics and ingested them. Both parties agree that the following morning, Defendant Comer attempted to wake Ruark by "hollering" at him at 6:00 a.m., by shaking him at 6:15 a.m., and then became concerned at approximately 6:30 a.m. Both parties agree that when Reed examined Ruark and observed his labored breathing, he "immediately became concerned for Dennis' safety (App. 215)". Both parties agree Ruark occasionally went to bed with a "cud" of tobacco in his mouth, and it is undisputed by plaintiffs, that Ruark was habitually hard to awaken in the morning evidenced by Defendant Drury's deposition testimony utilized by plaintiffs in their brief. (Pl. App. 481-484). Both parties agree an ambulance was summoned for Ruark's care within fifty (50) minutes of the original wake up call at 6 a.m. Both parties agree in their statement of the case that approximately one hour elapsed from the time of the first wake up call to the time that Ruark departed by ambulance for the hospital. Finally, it is undisputed Ruark was pronounced dead at 7:36 a.m. on September 30, 1985, of a morphine overdose which shut his system down and caused him to aspirate on his own stomach contents.

Since there is no dispute as to the basic facts surrounding the lawsuit, it then becomes an issue for the Court to determine whether or not there is sufficient evidence of alleged wrongful acts to allow the case to go to a jury. As pointed out by the trial court in its Order,

". . . it is of paramount importance in a deliberate indifference case to be mindful that, if generally construed as a claim of negligence, plaintiff's claims must fail. . . . " (A-20).

Ruark's self-imposed condition of drug induced unconsciousness did not go undetected because of Comer's alleged inability to identify medical emergencies. The condition was not detected because of the hour of the day and Ruark's habitual problem with early morning awakenings.

An unfortunate coincidence of the hour of his death, with the hour of wake-up calls, does not raise respondents' conduct to the level of conscious disregard for Ruark's medical need. Respondents must have had knowledge of Ruark's condition before they could consciously disregard it.

As this Court stated in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 91 L.Ed.2d 202 (1986), "if the evidence is merely colorable . . . or is not significantly probative, . . . summary judgment may be granted." There must be issues of fact material to the resolution of the dispute between the parties before the non-moving party can escape a motion for summary judgment. Having failed to produce sufficient evidence to create a genuine issue as to whether respondents committed the allegedly unlawful acts, summary judgment in respondents' favor was appropriate.

CONCLUSION

The Petition for Writ of Certiorari should be denied. As this Court stated in *Anderson v. Liberty Lobby*, 477 U.S. 242, 252:

> The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.

Respondents would submit the evidence required to find for petitioners is absent in the case now before the Court. For the reasons stated and set forth above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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No. 93-1881

In The

Supreme Court of the United States

October Term, 1994

DENNIS RUARK, SR. and MARY RUARK,

Petitioners,

vs.

LELAND BOATWRIGHT, GREGG REED, and ROBERT COMER,

Respondents.

On Petition For Writ of Certiorari to The United States Court Of Appeals For The Eighth Circuit

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TABLE OF CONTENTS

Page

Table of Authorities ii

Reasons for Granting the Writ 1

Conclusion 7

TABLE OF AUTHORITIES

Cases

Duckworth v. Franzen, 780 F.2d 645 (7th Cir. 1985), *cert. denied*, 479 U.S. 816 (1986) 1

Estelle v. Gamble, 429 U.S. 97 (1976) 1, 2

Farmer v. Brennan, ___ U.S. ___, 62 U.S.L.W. 4446 (1994) ..... *passim*

Wilson v. Seiter, 501 U.S. 294 (1991) 3

Other Authorities

1 W. LaFave & A. Scott, *Substantive Criminal Law* § 3.7 (1986) 4

REASONS FOR GRANTING THE WRIT

I. The Holding of the Court of Appeals Should be Reexamined by that Court in Light of this Court's Clarification of the Meaning of the Phrase "Deliberate Indifference."

On April 4, 1994, the United States Court of Appeals for the Eighth Circuit affirmed the District Court's summary judgment for Respondents. On May 25, 1994, Petitioners filed their Petition for Writ of Certiorari with this Court. In their Petition they claimed, *inter alia*, that the opinion of the Eighth Circuit improperly applied the deliberate indifference standard of *Estelle v. Gamble*, 429 U.S. 97 (1976), to the instant cause. They further argued that the phrase "deliberate indifference" "evades rather than expresses precise meaning." *Duckworth v. Franzen*, 780 F.2d 645, 652 (7th Cir. 1985), *cert. denied*, 479 U.S. 816 (1986). They concluded that the imprecision of the phrase had led to generalized confusion in the lower courts as to what was meant by "deliberate indifference" so as to warrant granting their Petition.

On June 24, 1994, Respondents filed their Brief in Opposition to Petition for Writ of Certiorari. In their Brief Respondents argue that granting of the writ would be inappropriate because there is no inconsistency in the holdings of the various circuits (Respondents' Brief at 5-6).

When they filed their Brief, Respondents were apparently unaware of the Opinion of this Court in *Farmer v. Brennan*, ___ U.S. ___, 62 U.S.L.W. 4446, handed down on June 7, 1994. In that Opinion this Court noted that it had granted certiorari "because Courts of Appeals had

adopted inconsistent tests for 'deliberate indifference.' " 62 U.S.L.W. at 4448. The Court therefore undertook for the first time "to define the term 'deliberate indifference. . . . ' " *Ibid.*, at 4447.

In formulating a test for deliberate indifference, the Court reviewed the evolution of the phrase since *Estelle v. Gamble* was decided. The Court noted that while deliberate indifference means something more than mere negligence, it is satisfied by something less than acts or omissions "for the very purpose of causing harm or with knowledge that harm will result." 62 U.S.L.W. at 4449. Although lower courts have routinely equated deliberate indifference with recklessness, it was unclear whether the kind of recklessness necessary to offend Constitutional minima was that encompassed by the civil law or by the criminal law. The former calls a person reckless who acts or fails to act in the face of an unjustifiably high risk of harm that is either known or so obvious that it should be known, 62 U.S.L.W. at 4449. In contrast the criminal law only permits a finding of recklessness when a person disregards a risk of harm of which he or she is aware. *Ibid.*

In *Farmer* this Court opted for the subjective test of recklessness found in the criminal law:

> We hold . . . that a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a

> substantial risk of serious harm exists, and he must also draw the inference.[1]

62 U.S.L.W. at 4449. The Court noted that this approach comported with the criminal law approach to recklessness which "generally permits a finding of recklessness only when a person disregards a risk of harm of which he is aware." *Ibid.* The Court concluded that "subjective recklessness as used in the criminal law is a familiar and workable standard . . . , and we adopt it as the test for 'deliberate indifference' under the Eighth Amendment." *Ibid.*, at 4450.

This Court acknowledged the concern that the subjective tests of recklessness might lead prison officials to simply ignore obvious dangers to prisoners, 62 U.S.L.W. at 4450. It went on to discount that concern:

> Under the test we adopt today, an Eighth Amendment claimant need not show that a prison official acted or failed to act believing that harm actually would befall an inmate; it is enough that the official acted or failed to act despite his knowledge of a substantial risk of serious harm.
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> Whether a prison official had the requisite knowledge of a substantial risk is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence, . . . *and a factfinder may conclude that a*

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[1] Although *Farmer* is a prison conditions case, the same test – deliberate indifference – applies in cases involving the failure to attend to a prisoner's medical needs, *Wilson v. Seiter*, 501 U.S. 294, 303 (1991).

> *prison official knew of a substantial risk from the very fact that the risk was obvious.*[2]

(Emphasis added.) *Ibid.*, at 4450-4451.

Applying the teaching of *Farmer* to the case *sub judice*, it quickly becomes apparent that Petitioners adduced sufficient evidence that Comer acted recklessly. If it is assumed that at 6:15 a.m. Comer saw Ruark choking (App. 106), saw brown fluid running from the corners of Ruark's mouth (App. 158), could not awaken him (App. 158), and saw that he was having obvious difficulty breathing (App. 157-158), then Comer's conduct satisfied the subjective recklessness test announced in *Farmer;* that is, the evidence would permit a finding that Comer disregarded "a risk of harm of which he [was] aware." 62 U.S.L.W. at 4449. Even if Comer claimed that he was unaware of the consequences that can befall someone who is choking and having difficulty breathing – something Comer has never claimed in the course of this litigation – the issue of whether Comer "had the requisite knowledge of a substantial risk *is a question of fact* subject to demonstration in the usual ways, including inference from circumstantial evidence. . . . " *Ibid.*, at 4451. (Emphasis added.) In the instant cause a factfinder could conclude that Comer "knew of a substantial risk from the very fact that the risk was obvious." *Ibid.*

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[2] This Court goes on to cite 1 W. LaFave & A. Scott, *Substantive Criminal Law* § 3.7, at 335 (1986), for the proposition that: "If the risk is obvious, so that a reasonable man would realize it, we might well infer that [the defendant] did in fact realize it. . . . " Cited at 62 U.S.L.W. at 4451.

The foregoing is even more compelling as to Reed and Boatwright. Comer testified that he summoned Reed at 6:30 when he again tried to awaken Ruark and again saw that Ruark was having obvious difficulty breathing, with brown fluid dripping out of his mouth (App. 164). Reed was only about 30 to 40 feet away at that time and came immediately upon being called by Comer (App. 165-166). When Reed looked at Ruark, he observed his labored breathing (App. 212) and saw brown fluid running from his nose and mouth, pooling on the floor below (App. 214). Given his previous training as a paramedic, Reed immediately became concerned for Ruark's safety at 6:30 and hurried to the Sheriff's office which was located about 65 feet from where Ruark lay dying (App. 215-216, 314-315). Reed knew the serious consequences that can attend an obstructed airway (App. 215-217), and for that reason he claims he hurried to the Sheriff's office and told Sheriff Boatwright of the problem Ruark was experiencing so that outside medical help could be summoned (App. 215-216). Despite Reed's claim that he hurried to get help at 6:30, it is uncontroverted that no call was made for an ambulance until 6:51 (App. 91). Reed admits that he was aware of the need to act quickly to save Ruark's life; he merely denies that he was responsible for the delay by Sheriff Boatwright in calling for an ambulance.

Sheriff Boatwright testified that as soon as Reed told him of a problem with Ruark, he had an ambulance called (App. 363). He did this because he knew that immediate action was needed to protect Ruark (App. 368). Sheriff Boatwright, like Reed, knew that if someone was having problems breathing, that person could die (App. 293). For

that reason Sheriff Boatwright admitted that he knew it would be wrong to wait 20 minutes before calling an ambulance for someone (like Ruark) who was having difficulty breathing (App. 374).

If a jury in this case believed Reed when he says he hurried to the Sheriff at 6:30 to seek help for Ruark, then Sheriff Boatwright was responsible for the 20 minute delay before an ambulance was finally called at 6:51. On the other hand if a jury believed Sheriff Boatwright when he testified that an ambulance was called just as soon as he was notified of Ruark's condition, then a jury could reasonably infer that Reed delayed seeking help for 20 minutes until 6:51 (when jail records show the call for help went out). In either event there is no question but that the person responsible for the delay "disregard[ed] a risk of harm of which he [was] aware." 62 U.S.L.W. at 4449.

In light of the test articulated in *Farmer*, the Eighth Circuit should be given the opportunity to reexamine its opinion.

CONCLUSION

This Court should grant the Petition for Writ of Certiorari, vacate the judgment of the lower court, and remand this case to the United States Court of Appeals for the Eighth Circuit for further consideration in light of *Farmer v. Brennan, supra.*

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